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Supreme Court of the United States

October Term, 1963

No. 672

PETER IGNERI and THERESA IGNERI,

Petitioners,

—against—

CIE. DE TRANSPORTS OCEANIQUES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Petition

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Supreme Court of the United States

October Term, 1963

PETER IGNERI and THERESA IGNERI,

Petitioners,

—against—

CIE. DE TRANSPORTS OCEANIQUES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Theresa Igneri, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed on September 18th, 1963, affirming a final judgment entered in the United States District Court for the Eastern District of New York on June 11th, 1962, reported at 207 F. Supp. 236, which dismissed petitioner Theresa Igneri's cause of action, for failure to state a claim upon which relief can be granted, her claim being for damages for loss of consortium resulting from an injury to her husband allegedly caused by respondent's maritime negligence and the unseaworthiness of its vessel.

The opinion of the Court of Appeals, made a part of the appendix to this petition, is not yet officially reported.

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on September 18, 1963 (58a).*

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. 1254 (1) and 2101, as well as Rule 19 (b) of the Rules of this Court. Diversity of citizenship and damages that exceed the jurisdictional amount of $10,000.00 exclusive of interest and costs were the basis for federal jurisdiction in the Court of first instance.

Questions Presented for Review

1. Is a wife's cause of action for loss of consortium, including companionship, support, love, affection and all facilities for domiciliary happiness enjoyed in a normal marriage, prompted by a maritime tort to her longshoreman-husband, barred by the common law anachronism of her inequality and servitude, and so erroneously dismissed despite the progressive and humanitarian maritime law enunciated by this Court?

2. Is the dismissal of a wife's cause of action in violation of her Constitutional rights, particularly the Seventh Amendment, and another example of prejudicial inequality of the sexes in our courts of law?

3. Where the maritime law has allowed a husband's suit for loss of services of his wife, is she not entitled

* Numbers in parentheses with suffix "a" refer to petitioner's appendix to brief in Court of Appeals. Those numbers with prefix "R" relate to the transcript below.

in this enlightened era to have a converse claim on her behalf properly resolved by a court and jury?

Statement of the Case

Respondent moved to dismiss the second cause of action contained in the complaint on the ground that it failed to state a claim upon which relief could be granted pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Its major argument was that "This Court is bound by the decisions of the State of New York with regard to the right of recovery for the loss of consortium" and that "In New York State a wife cannot maintain an action for loss of consortium as a result of personal injuries sustained by her husband due to the negligence of a third party" (R. 14, 15). After receiving petitioner's papers in opposition, respondent expanded its contention to state "there is no basis for granting petitioner's wife relief under Maritime Law" (R. 55).

Petitioner's papers in opposition recite factually that on June 21, 1959, while employed as a longshoreman aboard a merchant vessel in navigable waters, the 25 year old Peter Igneri suffered a fracture of his spine with complete paralysis of the lower extremities and bladder, in addition to other grievous and permanently devastating injuries. He was hospitalized thereafter, from the date of occurrence to December 12, 1959, and is still under treatment and in need of constant medical attention and assistance from his wife and medical therapists. Accordingly, the picture of the husband's disability in this case is such that the wife Theresa is herself grievously damaged and compelled to nurse an invalid for a lifetime, with a disruption of her marital life and without the opportunity to start a new and healthy family as would

have followed an intentional interference with her marital status on which she could have brought action as an emancipated person (R. 20, 21).

On the basis of authorities cited the Courts below disregarded the major argument by respondent as to New York law being applicable, but sustained the argument that there was no relief for the wife under maritime law, and dismissed and then affirmed the dismissal of her cause of action.

Reasons for Granting the Writ

The overriding national significance of this case is that it admittedly has never been before a Federal Court of Appeals, and the appeal was so considered below "since the appeal presented a question of novel impression . . ." The Court below also concedes " . . . it was the impact on her husband, which occurred on navigable waters, that caused the injury to her".

There is also a concession that the opinion below is in conflict to that of another circuit, *Hitaffer* v. *Argonne Co.*, 183 F. 2d 811 (D. C. Circuit), cert. den. 340 U. S. 852, which had rejected the common law authority to the contrary and held that a wife could obtain such a recovery. There has been a conflict of State and Federal opinions since 1950 when *Hitaffer*, *supra*, was decided, in that eight State Courts have followed *Hitaffer*, and Federal Courts have interpreted the law of two other states to the same effect.

The principle involved in this issue of first impression affects the wives of thousands of longshoremen, and generally, the rights of approximately half the population of the United States.

This Honorable Court should exercise its paramount authority to resolve the conflict and prompt uniformity in this matter, and further, consistent with its humanitarian mandate in Maritime Law, preserve the right of trial by jury to all who are adversely and tortiously afflicted by maritime negligence.

POINT I

The opinions below, purportedly of first impression, erroneously disregard the cultural and social truths of today to justify retrogression in maritime law by the imposition of a wholly discredited common law anachronism.

The opinions below misconceive the anachronism to be that the husband still has a cause of action for loss of his wife's services. In the light of the legal and social advances that firmly grant equality to women, the anachronism really is that a legal right afforded the husband is not granted his wife. The cruelty of the common law's denial of a wife's recovery in damages for the loss of her husband's services paralleled the old maritime law's indifference to the rights of seamen. As seaman's law has evolved by progressive legislation and humanitarian mandate from the Supreme Court, so we expect that the emancipation of women must prompt an equal recognition of her loss and damages by the crippling of her breadwinner and the tortious deprivation of a husband as a whole man.

Mr. Justice Holmes once had occasion to state that the common law was not a closed system of static rules, immutable unless changed by legislation. As this anachronism was not made in the halls of legislatures, but

actually was judge-made in different and restricted times, should it not be judge-unmade, on the truth of Mr. Justice Holmes' further observation that "in moving waters there is life and health; in stagnant pools, decay and death"?

The Courts below present arguments to justify retention of a discredited distinction between the rights of a man and his wife. They are easily answered.

Where they state a wife has no pecuniary loss equivalent to her husband's financial support, which he has on a suit for loss of his wife's services, the opinions overlook the various elements of general damage in a personal injury case short of wrongful death. These damages include felicity, sexual relations and other essential elements of companionship, and the imposition of a burden to care for an invalid for a lifetime.

Where the opinions below would deny the right to a wife as it is derivative and a consequence of her husband's injury, without exposure to a direct and independent impact or apprehension, it forgets that a husband's cause for loss of services has the same elements and is not denied therefor. Today's enlightened span of damages without actual impact or immediate apprehension is applicable to answer an archaic argument used to justify an archaic principle.

Where the opinions below fear a duplication in part of the award to the husband, coupled with the risk of speculative damages and unreliable testimony, it overlooks the effect of proper instructions and the power of the trial and appellate courts to keep damages in proper bounds. See *Dagnello* v. *Long Island Railroad*, C. C. A. 2d, 289 F. 2d 797. All these grounds for dismissing a wife's cause of action are discussed more fully *infra*.

This Court has stated the following in *Hawn* v. *Pope & Talbot*, 346 U. S. 406, 408, 74 S. Ct. 202:

> "The harsh rule of the common-law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires".

It is apparent that the issue of comparative negligence relates itself to damages, and that the aspect of damages is peculiar to maritime torts. As the cause of action for loss of services brought by the wife is also one for damages, it should be related to the humanitarian principles of maritime law, and not to the limiting effect of inapplicable state decisional law. On public policy considerations alone, at least half the nation's population should not be denied the rights flowing from emancipation. Where the common-law is unfairly restrictive, it must be ignored.

Since 1959, prodded by the landmark case of *Hitaffer* v. *Argonne Co. Ins., supra*, the authorities have tended to allow a wife equal rights. This decision is discussed in a law review note captioned, *Judicial Treatment of Negligent Invasion of Consortium*, 61 Columbia Law Review 1341 (November, 1961), also reviewing the arguments against allowing a wife to sue for loss of services, to conclude that they completely fail in reason and fairness to deny a wife's right to sue.

The arguments advanced against the right to sue by an emancipated wife could be synthesized as follows: that as at common-law a husband was the only party, as a

superior, who could sue for damages to his inferior wife's capacity to render services, any change should be by statute, not by judicial opinion; that extension of this right to the wife would bring in remote relatives claiming the same loss of services; that an action for loss of the wife's services is based on the wife's position of servitude, and as this is anachronistic today, then the converse to now favor the wife must also be outmoded; that this would be an aspect of damages based on social, emotional and psychological reasons, with a possible double recovery on loss of support which should be avoided.

It is pointed out that the basis for the loss of consortium action at common-law by the husband was analogous to the master-servant, or superior-inferior relationship, where only the superior was allowed to make a claim. These "services" also included sentimental aspects as aid, society, conjugal affection, etc., and therefore, even under common-law principles the service requirement was abandoned as of minor relative consequence. Before the Married Women's Acts in various states, a wife would not be able to initiate action without the joinder of her husband, whereas today she can, and has the same rights as her husband with respect to suit and recovery for interference with the marital relationship. The important case of *Bennett* v. *Bennett*, 116 N. Y. 584, 23 N. E. 17 (1889) is cited with respect to the proposition that loss of consortium creates as much injury to the wife as to the husband, and therefore, she would have the same basis in an action for alienation of affection. A distinction between interference with the marital relationship, as in the *Bennett* case, *supra*, and a negligent invasion thereof as in the instant case, can be made only to show the latter oftentimes creates greater suffering, for in the event of divorce, there is a possibility of remarriage and opportunity for

both to start life anew. In the event of an injury to the husband, as in the instant case, there is no new legal opportunity to start a new and healthy family life but instead the wife is charged with the lifelong duty of nursing an invalid, to her equally a continuing injury. There have been nine jurisdictions that have followed *Hitaffer, supra*, granting the wife the same right to recover for negligently inflicted loss of consortium as to the husband. The rationale is that loss of services is not the predominant element of consortium, and therefore its absence in the case of the wife who must perform services though emancipated does not provide a fatal distinction to her action. The wife has a direct interest, is not a remote beneficiary, and therefore the fear of other relatives making claims is without basis on a proper appreciation of this singular right.

It is further pointed out that there is no need for the legislature to reform this particularly judicial concept. As all agree that the interest of the wife should not be interfered with, then the degree of culpability comes into play, and this should not be measured by the difference between intentional and negligent invasions. Damages flowing from this continuing injury, imposing on her the lifelong duty of nursing an invalid, are no more remote than other consequences of negligence; and there can be no double recovery with respect to loss of support where a Charge is proper and the verdict within bounds. It is pointed out that the insurance coverage involved is spread to the community and the society, "which so freely imposes obligations on individuals who marry, should be correspondingly generous in compensating them when their marriage is disrupted" (page 1357 of 61 Columbia Law Review).

It is apparent that this concept of a wife's action for loss of her husband's support, companionship, etc., is part of a recovery for reasons not related to actual impact of a physical nature. Impact for tort recovery is no longer required. *Ferrara* v. *Galluchio*, 5 N. Y. 2d 16, 176 N. Y. S. 2d 996; *Battalia* v. *State*, 10 N. Y. 2d 237.

A pertinent decision, with a holding outright that a wife can recover for a loss of consortium where her husband had been negligently injured, is *Dini* v. *Naiditch*, 20 Ill. 2d 406, 170 N. E. 2d 881 (Sup. Ct. of Illinois, 1960), by Bristow, J. Judge Bristow disposes of the "double recovery" argument against the wife's action for loss of consortium on the ground that it ignores the other essential elements of companionship, felicity and sexual relations, and that in the wife's suit she is not suing merely for loss of support but for the other elements as well. He further answers this contention by stating, "Any conceivable double recovery . . . can be obviated by deducting from the computation of damages in the consortium action any compensation given her husband in his action for the impairment of his ability to support". (p. 891 of 170 N. E. 2d), and goes further by stating, "We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities" (p. 892 of 170 N. E. 2d). Analogously, see Professor Robert E. Keeton's article on *Creative Continuity in Tort Law*, 75 Harvard Law Review 468, to the effect that in Courts of Law, rather than in the halls of legislatures, has our law primarily evolved to become the envy of the world, and that removing even the hoary charitable immunities doctrine would not have been possible by legislation, by reason of legislative inertia that would have delayed or defeated attempts at reform.

Strangely, the opinions below impose greater restrictions on the rights of wives of seamen, and longshoremen who are akin to seamen, on the reasoning that the advanced principles of maritime law afforded to men are inversely diminished for their wives. The warranty of seaworthiness and the doctrine of comparative negligence are stated below to be non-existent under common law and so beyond the limits of liability of those common-law authorities that allow a wife's recovery for loss of society.

Respectfully, this rationale is contrary to the progressive meaning and effect of current decisional law in the maritime field. The warranty of seaworthiness is grounded in its own common-law antecedents and should not be diluted in this case of first impression by the archaic failings of shore-based common law. Those enlightened authorities that permit a wife's action are not "common-law authorities", but realists responsive to the truth of today's equality of the sexes, supplemented by legislative recognition in the Married Women's Acts. The Courts below also overlook Peter Igneri's cause of action for negligence, which overlaps his cause for unseaworthiness, the latter also requiring evidence of proximate cause and foreseeability. See *Morales* v. *City of Galveston*, 370 U. S. 165 (1962); *Pinto* v. *States Marine Corp.*, C. C. A. 2d, 296 F. 2d 1 (1961). Gilmore & Black, *The Law of Admiralty*, The Foundation Press, 1957, at pages 315 and 316, is stated that Jones Act negligence and unseaworthiness are virtually merged, and alleging the Jones Act is done "more from habit than from need".

With respect to the lower Courts' approach to the comparative negligence doctrine, certainly the wife cannot recover if her spouse is found solely negligent. Her cause arises from proven negligence of the shipowner as it affects her rights. Rhetorically, should the measure of

negligence that is excised from the award to her husband be imputed to her for a complete denial of her cause of action? If so, which is denied, then her cause could be subjected to the equivalent diminution of damages under the same all-embracing doctrine of comparative negligence.

POINT II

The rationale of leading cases and texts on the subject must compel this learned Court to agree that the denial of the wife's cause of action is grounded in error and in disregard of her rights in the light of current principles of social equality and maritime law.

The Court below seeks precedent in *Savage* v. *New York, N. & H. S.S. Co., Limited*, D. C. N. Y. aff'd per curiam on the opinion below, 2 Cir., 1911, 185 F. 778, to the effect that no instance of an action per *quod consortium amisit* had ever been decided before in admiralty. This is not so.

That such right exists in the husband is but carrying to its logical conclusion the reasoning of Mr. Justice Story in *Plummer* v. *Webb*, Fed. Cas. No. 11,233, 4 Mason 380 (1827), where it was held that a father may maintain a suit in admiralty for a tortious abduction of his minor son for a voyage on the high seas, in the nature of an action per *quod servitium amisit*.

In the *Sea Gull*, Fed. Cas. No. 12,578 (1865), it was held that:

> "A husband can recover, in a proceeding in rem against the vessel which caused the death of his wife for the injury suffered by him thereby."

See: *N. Y. and Long Branch Steamboat Co.* v. *Johnson*, C. C. A. 3, 195 F. 740 (1912).

True, since the time of Blackstone and until the last decade, the right which petitioner seeks has not been recognized. But the law is an ever growing tree, always recognizing and encompassing economic, political and social developments as they evolve. Indeed, the law would become harmful rather than beneficial if it did not.

The damage to the petitioner in many respects is distinct and singular when compared to the damage to her spouse. To deny her recovery on the ground that she might share what the husband will eventually get, is not quieted by referring to this as "a rationale distinction", when in effect it is outright discrimination.

The Court of Appeals below does disregard the overwhelming weight of authority in the various texts and notes written by scholars on the law, and though admitting "the commentator vote has been considerably more favorable to the *Hitaffer* result than the judicial", nonetheless quarrels with Benedict on *Admiralty*, Sixth Edition, Knauth, 1940, p. 366, referred to in footnote 20 of the opinion, as follows:

> "When a personal injury to a wife is maritime by locality, her husband may recover his damages for loss of her services, loss of consortium, etc., in admiralty".

In accord: *New York and Long Branch Steamboat Co. v. Johnson, supra.*

The 1941 edition of *Prosser on Torts*, noting an almost universal condemnation by legal writers of the old rule, states on page 948:

> "The loss of services is an outworn fiction, and the wife's interest in the undisturbed relation with her

consort is no less worthy of protection than that of the husband. Nor is any valid reason apparent for allowing her recovery for a direct interference by alienation of affections, and denying it for more indirect harm through personal injury to the husband, where no such distinction is made in his action. There remains of course the important fact that the husband is under the duty to support his wife, so that any compensation for loss of earning power paid to him goes indirectly to benefit her, while the wife is under no corresponding duty. This must necessarily be taken into account in any determination of her damages. But such elements of damage as her loss of the husband's society and affection, and in some cases even the expenses to which she has been put in caring for him, remain uncompensated. Ultimately, it may be expected that public opinion as to the equality of the sexes will force recognition of the wife's action."

We respectfully submit that since 1950 the great weight of authority does not deny a right of action to a wife for loss of consortium resulting from a negligent injury to her husband. Since the classic case of *Hitaffer* v. *Argonne Company, supra*, many cases on this question have arisen in the context of the Workmen's Compensation statute. In these cases the Courts have not held that there is no independent cause of action for the loss of consortium but rather that under the exclusive remedy provision of their particular Workmen's Compensation statute, no independent cause of action can arise other than the remedy provided therein, and an example of a case in this area is *Smither & Co. Inc.* v. *Coles*, 242 F. 2d 220, in which the very Court which decided the *Hitaffer* case held that though there is a cause of action for loss of consortium,

such independent action cannot exist against the employer under the Longshoremen's & Harbor Workers' Compensation Act.

The comparison of a seaman to a longshoreman whereby a seaman's wife would not be able to sue under the Jones Act (46 U. S. C. 688), for loss of consortium, whereas the wife of a longshoreman may under general maritime law, ignores the principle that the Jones Act has merged with the warranty of seaworthiness, and sounds in general maritime law equally for other maritime workers. Congress has not had the question before it, and that it was not embodied in the statute to allow a wife to sue, does not mean that all maritime workers should therefore be deprived of this right.

In Harper & James, *Law of Torts*, Volume I, Section 8.10, page 643, the authors, after having discussed the "scholarly opinion" given by the Court of Appeals for the District of Columbia in *Hitaffer* v. *Argonne Co.*, *supra*, stated the following on that opinion:

> "This devastating attack upon the older rule is a realistic approach to the problem and a recognition of the obvious fact that the often hypothetical 'services' may and frequently are the least valuable aspect of the incidents of the marital relation which presumably are as valuable to the wife as to the husband and thus merit the same legal protection and that certainly the problem is not well handled by refusing protection to neither".

Petitioner believes she has shown that because of changes in our society there is a trend in the law to recognize those changes by permitting actions as the one brought here. Only a small number of Courts have been presented

with prayers for judicial recognition of such actions since *Hitaffer* in 1950, but the number of such Courts either reversing prior unfavorable decisions or deciding anew that such actions may be brought, is proportionately large. Petitioner is aware that some decisions since *Hitaffer, supra,* are adverse. However, she states that the laws of all States do not change at one and the same time. The important consideration is the trend and need of change in the law applicable.

The Court below concedes that the great majority of distinguished text writers favor petitioner's position. It is inconceivable to them that a right given a husband should not be equally granted his wife. When both actions are brought together, that for the husband as well as for the wife, and the same fact-finders determine a proper allocation of damages in the light of a Charge that would prevent duplication, it must follow that today's law should not perpetuate error. In the words of Oliver Wendell Holmes, "the old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received". *The Common Law*, edited by Mark De Wolfe Howe, Belknap Press of Harvard University Press, Cambridge, Mass., 1963, page 8.

Reliance by the Court below on the restrictive interpretation of Workmen's Compensation Acts and the Jones Act, which deny extension to a wife, is not pertinent to the broad field of the untrammeled maritime law.

In *Southern Pacific Company* v. *Jensen*, 244 U. S. 205 (1917), it was held unconstitutional to apply a state Workmen's Compensation Act to a longshoreman who was injured aboard a vessel, as his rights were held to be created by the maritime law and were enforceable in admiralty or in the common law courts under the savings

clause. "The maritime law was to have national uniformity and this would be disturbed if local state Workmen's Compensation Acts were permitted to cover maritime injuries" (p. 71 of Baer, *Admiralty Law of the Supreme Court*, The Michie Company, Virginia, 1963, p. 72).

Baer also states with respect to *Jensen, supra*, the following:

> "Further, the Court repeated its earlier declaration that the harmony and uniformity sought for maritime law as conceived by the Constitution would be defeated if state Workmen's Compensation Acts were to apply to injuries suffered by employees engaged in maritime work" (p. 72 of Baer).

CONCLUSION

On a full appreciation of novel issues involved, and the direct conflict between various courts on this very issue, to allow the judgment below to stand would adversely affect all maritime cases and the rights of women to a fair day in court. Petitioner respectfully prays that a Writ of Certiorari be granted and or that this Honorable Court summarily reverse the Court below and remit the case for trial together with the cause of action on behalf of her husband.

Respectfully submitted,

PHILIP F. DICOSTANZO
Attorney for Petitioners

Dated: Brooklyn, New York
October , 1963

ROBERT KLONSKY and
PHILIP F. DICOSTANZO
On Petition

APPENDIX

Opinion of Circuit Court

—37a—

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 351—October Term, 1962

(Argued June 6, 1963 Decided September 18, 1963)

Docket No. 27801

PETER IGNERI and THERESA IGNERI,

Plaintiffs-Appellants,

v.

CIE. DE TRANSPORTS OCEANIQUES,

Defendant-Appellee.

Before:

WATERMAN, FRIENDLY and SMITH, *Circuit Judges.*

Appeal by plaintiff, wife of a longshoreman, from a judgment of the District Court for the Eastern District of New York, John R. Bartels, Judge, 207 F. Supp. 236, dismissing, for failure to state a claim upon which relief can be granted, her claim for damages for loss of consortium resulting from an injury to her husband allegedly caused by defendant's negligence and by unseaworthiness of defendant's vessel. Affirmed.

PHILIP F. DICOSTANZO (DiCostanzo, Klonsky & Sergi), Brooklyn, New York, *for Plaintiffs-Appellants.*

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THOMAS J. SHORT (Dougherty, Ryan, Mahoney & Pellegrino), New York, New York, *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

The issue, here presented for the first time in federal Court of Appeals, is whether the wife of an injured longshoreman can recover for the loss of her husband's consortium caused by negligence of the shipowner or unseaworthiness of the ship. Two other district judges have concluded, as Judge Bartels did here, that she cannot. *Bergamaschi* v. *Isthmian Lines, Inc.*, 1959 A. M. C. 1862 (S. D. N. Y.); *Pruitt* v. *M. S. Rigoletto*, 211 F. Supp. 295 (E. D. Mich. 1962). We agree.

Peter and Theresa Igneri, husband and wife, brought this action in the District Court for the Eastern District of New York against Cie. de Transports Oceaniques. Their complaint invoked federal jurisdiction on the basis of diverse citizenship, the Igneris being alleged to be citizens of New York and defendant a foreign corporation. In a "First Cause of Action," Peter Igneri claimed damages for injuries sustained when he was struck by a bale of rubber while working as a longshoreman in the employ of a stevedoring contractor, aboard defendant's vessel in Brooklyn harbor. The injuries are claimed to be permanent and to include a fracture of the spine with complete paralysis of the lower extremities and bladder. Liability was asserted on the bases of negligence by the shipowner and of unseaworthiness of the vessel. In a "Second Cause of

Action," Theresa Igneri sought further damages on the ground that "heretofore and for many years prior to this occurrence [she and Peter Igneri] * * * were and still are husband and wife, living together as such and in a happy

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connubial state * * *" and that as a result of the occurrence she "has been deprived of the services of her husband, Peter Igneri, his companionship, support, love, affection and consortium, as well as all facilities and domiciliary happiness normally enjoyed in normal marriage." Judge Bartels granted defendant's motion to dismiss the second cause of action as failing to state a claim upon which relief could be granted, 207 F. Supp. 236. Subsequently he amended his order to include the statement specified in 28 U. S. C. § 1292(b); we granted a timely application by Mrs. Igneri for leave to appeal, since the appeal presented a question of novel impression which ought be determined at this time so that, in the event of our disagreeing with the district judge, the two claims could be tried together.

(1). We begin by noting our approval of Judge Bartels' overruling an argument by defendant, which indeed has not been seriously pressed in this Court, that Mrs. Igneri's claim must be dismissed because, the action having been brought on the "law side", New York law controls and New York does not recognize a wife's claim for loss of consortium. *Krowchibitzer v. Washburn Wire Co.*, 4 N. Y. 2d 524; 176 N. Y. S. 2d 254 (1958).

Mrs. Igneri's claim is governed not by the law of New York but by the general maritime law. Although she was not aboard ship, it was the impact on her husband, which occurred on navigable waters, that caused the injury to her. *Jordan v. States Marine Corp.*, 257 F. 2d 282 (9 Cir. 1958); *Pratt v. M. S. Rigoletto, supra.* The same considerations as to the desirability of uniformity that are relevant,

to the relations between a ship and those who work upon her apply with like force to claims by a worker's wife resulting from an injury to him. Suits by a husband, father, or wife for injury allegedly resulting from a shipboard accident to a family member have uniformly been held to in-

volve maritime torts. *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 Fed. 740 (3 Cir. 1912); *Plummer* v. *Webb*, 19 Fed. Cas. 891, 892-93 (No. 11, 233) (C. C. Maine 1827); *Pruitt* v. *M. S. Rigoletto, supra*; *Westerberg* v. *Tide Water Associated Oil Co.*, 304 N. Y. 545, 110 N. E. 2d 395 (1953). The wrong to Mrs. Igneri, if any, being maritime, it is unnecessary to do more than cite *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244-45 (1942); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409-10 (1953); and *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959), for the proposition that if the maritime law recognizes a claim such as that here asserted, this could not be defeated by a contrary New York rule.[1]

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[1] It is true that in actions brought to recover for the death of longshoremen injured while working aboard ship in state territorial waters, state law is held to govern the existence and also the attributes of a cause of action for wrongful death. *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921); *The Tungus* v. *Skovgaard*, 358 U. S. 588 (1959). But this is a special situation wherein state law is utilized to fill a gap in the maritime law, created by the holding, in *The Harrisburg*, 119 U. S. 199 (1886), that there is no liability for wrongful death under the general maritime law—a holding which a penetrating commentator has suggested the Supreme Court would have done better to overrule. D. Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1960 Supreme Court Review 158, 188, 195, 196. As shown by the cases cited in the text, this exceptional doctrine would not be followed as an analogy so as to permit state law to defeat a claim for a tort on navigable waters recognized by maritime law. See also, as to survival of a maritime claim against the estate of a defendant, *Just* v. *Chambers*, 312 U. S. 383, 387-92 (1941).

(2) Although New York's denial of a claim by a wife for loss of consortium is thus in no way decisive, it does not follow that reference to the common law generally is without relevance. Maritime law draws on many sources; when there are no clear precedents in the law of the sea, admiralty judges often look to the law prevailing on the land. See Gilmore and Black, Admiralty (1957), § 1-16. At least this much is true. If the common law recognized a wife's claim

for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. Compare *The Harrisburg*, 119 U. S. 199, 213-14 (1886). So we turn to the common law.

It was early held, and still is in the great majority of American states, that one who causes personal injury to a married woman, intentionally or negligently, is subject to liability to her husband for loss of consortium[2] as well as for any reasonable expenses incurred by him in providing medical treatment. American Law Institute, Restatement of Torts (1938), § 693; see Prosser, Torts (2d ed. 1955), at 701; Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Colum. L. Rev. 1341, 1348-49 (1961). But until 1950 no decision (save for two that were rather promptly disapproved[3]) allowed a recovery by a wife for

[2] "Consortium" is the mutual right of the marriage partners to each other's society, companionship, and affection, including sexual intercourse, and, in the husband's case, his right to the services of his wife. See Lippman, The Breakdown of Consortium, 30 Colum. L. Rev. 650 (1930).

[3] *Hipp* v. *E. I. Du Pont de Nemours & Co.*, 182 N. C. 9, 108 S. E. 318 (1921), overruled by *Hinnant* v. *Tide Water Power Co.*, 189

loss of consortium resulting from a negligent injury to her husband. Restatement of Torts, *supra*, § 695; 1 Harper & James, Torts (1956), at 641; Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1, 2-4 (1923). In that year the Court of Appeals for the District of Columbia Circuit, in *Hitaffer v. Argonne Co.*, 183 F. 2d 811 (D. C. Cir.), rejected the monolithic authority to the contrary and

held, under the domestic law of the District,[4] that a wife could obtain such a recovery. Since 1950 eight state courts have followed the *Hitaffer* decision,[5] federal courts have interpreted the law of two other states to the same effect,[6] and in one state the same result has been achieved by statute.[7] As against the 12 American jurisdictions[8] which

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N. Y. 126, 126 N. E. 307 (1925); *Griffen v. Cincinnati Realty Co.*, 27 Ohio Dec. 585 (Super. Ct. 1913), disapproved *sub silentio* by *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N. E. 204 (1915).

[4] Although the *Hitaffer* opinion does not state the type of work in which the injured husband was engaged, it appears that the case had no maritime aspect, and that the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§901 *et seq.*, were involved only because that Act has been adopted as the applicable workmen's compensation statute for the District of Columbia. See D. C. Code 1940, §§36-501, 36-502.

[5] *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 251, 299 S. W. 2d 41, 45-49 (1957); *Stenta v. Leblanc*, 185 A. 2d 759 (Del. 1962); *Brown v. Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S. E. 2d 24 (1st Div. 1953), and *Bailey v. Wilson*, 100 Ga. App. 405, 111 S. E. 2d 106 (2d Div. 1959); *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N. E. 2d 881 (1960); *Acuff v. Schmit*, 248 Ia. 272, 78 N. W. 2d 480 (1956); *Montgomery v. Stephan*, 359 Mich. 33, 101 N. W. 2d 227 (1960); *Novak v. Kansas City Transit, Inc.*, 365 S. W. 2d 539 (Mo. 1963); *Hoekstra v. Helgeland*, 98 N. W. 2d 669 (S. D. 1959).

[6] *Duffy v. Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 1961); *Cooney v. Moomaw*, 109 F. Supp. 448 (D. Neb. 1953), and *Luther v. Maple*, 250 F. 2d 916, 922 (8 Cir. 1958) (Nebraska law).

[7] Ore. Rev. Stat. §108.010 (1955).

[8] This total includes the District of Columbia, where *Hitaffer* is still the law as to the wife's rights against parties other than the

may thus be said to have espoused the *Hitaffer* result, 19 such jurisdictions which have considered the question since

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Hitaffer, have continued to deny recovery to a wife.[9] So also has the *House of Lords*, *Best* v. *Samuel Fox & Co.*, [1952] A. C. 716, without a dissenting voice. However, in

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husband's employer. The case was "overruled" in *Smither & Co.* v. *Coles*, 242 F. 2d 220 (D. C. Cir.), cert. denied, 354 U. S. 914 (1957), but only as to its additional holding that §5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §905, see note 4 *supra*, did not bar the wife's action against the employer. See also *Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F. 2d 42, 47-48 (5 Cir. 1960). The ruling in *Hitaffer* on the point here relevant was followed in *Rollins* v. *District of Columbia*, 265 F. 2d 347 (D. C. Cir. 1959), and in *Aubrey* v. *United States*, 254 F. 2d 768, 772-3 (1958), although in the latter case, as in *Brown* v. *Curtin & Johnson, Inc.*, 221 F. 2d 406, 408 (D. C. Cir. 1955), the court suggested that it might sometime want to reconsider the question.

[9] *Smith* v. *United Constr. Workers*, 274 Ala. 42, 122 So. 2d 153, (1960); *Jeune* v. *Del E. Webb Constr. Co.*, 77 Ariz. 226, 269 P. 2d 723 (1954); *Deshotel* v. *Atchison, T. & S. F. Ry.*, 50 Cal. 2d 664, 328 P. 2d 449 (1958); *Jolinson* v. *Enloe*, 132 Colo. 101, 286 P. 2d 630, 634 (1955); *Lockwood* v. *Wilson Lee Co.*, 144 Conn. 155, 128 A. 2d 330 (1956); *Ryder* v. *Envil*, 61 So. 2d 420 (Fla. 1952); *Criqui* v. *Blaw-Knox Corp.*, 318 F. 2d 811 (10 Cir. 1963) (Kansas law); *La Eace* v. *Cincinnati, N. & C. Ry.*, 249 S. W. 2d 534 (Ky. 1952); *Coastal Truck Lines, Inc.* v. *Canales*, 27 Md. 37, 113 A. 2d 82 (1955); *Snodgrass* v. *Cherry-Burrell Corp.*, 103 N. H. 56, 164 A. 2d 579 (1960); *Larocca* v. *American Chain & Cable Co.*, 24 N. J. Super. 195, 92 A. 2d 841 (App. Div. 1952); *Kronenbitter* v. *Washburn Wire Co.*, 4 N. Y. 2d 624, 176 N. Y. S. 2d 354, 151 N. E. 2d 898 (1958); *Nelson* v. *A. M. Lockett & Co.*, 206 Okla. 341, 243 P. 2d 719 (1952); *Newberry* v. *Botanics*, 401 Pa. 146, 162 A. 2d 662 (1960); *Page* v. *Water*, 240 S. C. 516, 126 S. E. 2d 570 (1962); *Garrett* v. *Reno Oil Co.*, 271 S. W. 2d 764 (Tex. Civ. App. 1954); *Aso* v. *S. S. Mullen, Inc.*, 43 Wash. 2d 345, 261 P. 2d 118 (1953); *Seagraves* v. *Legg*, 127 S. E. 2d 605 (W. Va. 1962); *Vickel* v. *Hardware Mut. Cas. Co.*, 266 Wis. 647, 70 N. W. 2d 205 (1955).

See also *Burk* v. *Anderson*, 232 Ind. 77, 109 N. E. 2d 407, 408 (1952), and *McVickers* v. *Chesapeake & O. Ry.*, 134 F. Supp. 848 (E. D. Mich. 1961); *Hartman* v. *Cold Spring Granite Co.*, 247 Minn. 515, 77 N. W. 2d 651 (1956); *Simpson* v. *Pounds*, 244 Miss. 834, 133 So. 2d 286 (1961).

a number of these cases the opinions have made it plain, and others have implied, that the court agreed with *Hitaffer* in principle but felt constrained to leave any "change in the common law" to the legislature.[10] The commentator vote has been considerably more favorable to the *Hitaffer* result than the judicial. We have found only two voices,[11]

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but these notable ones, against the wife's recovery.[12]

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[10] *E.g.*, *Smith* v. *United Constr. Workers*, 122 So. 2d 153 (Ala.); *Ripley* v. *Ewell*, 61 So. 2d 420 (Fla.); *Larocca* v. *American Chain & Cable Co.*, 92 A. 2d 811 (N. J.); *Page* v. *Winter*, 126 S. E. 2d 570 (S. C.); *Garrett* v. *Reno Oil Co.*, 271 S. W. 2d 764 (Tex.)—all *supra* note 9.

[11] Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law & Contemp. Prob. 219, 228-30 (1953); Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 194-95 (1916).

[12] The pro-wife vote includes Prosser, Torts (2d ed. 1955), at 704-05; 1 Harper & James, Torts (1956), at 643; Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1, 8-9 (1923); Lippman, The Breakdown of Consortium, 30 Colum. L. Rev. 651, 664-68 (1930); Kinnaird, Right of Wife to Sue for Loss of Consortium Due to Negligent Injury to Her Husband, 35 Ky. L. J. 220, 223 (1946); Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Colum. L. Rev. 1341, 1352-57 (1961); 55 Mich. L. Rev. 721 (1957); 39 Cornell L. Q. 761 (1954); 1 U. C. L. A. L. Rev. 223 (1954); 41 Geo. L. J. 443 (1953); 64 Harv. L. Rev. 672 (1951); 29 N. C. L. Rev. 178 (1951); 25 Tulane L. Rev. 293 (1951); 20 Fordham L. Rev. 342 (1951); 39 Mich. L. Rev. 820 (1941); 9 Ind. L. J. 182 (1933); 5 Cornell L. Q. 171 (1920).

See also Green, Relational Interests, 29 Ill. L. Rev. 460, 466-67 (1934); Brett, Consortium and Savitium: A History and Some Proposals, 29 Austral. L. J. 321, 432-33 (1955).

The Restatement of Torts, published in 1938, stated that "The wife has a similar interest in the society and sexual relations with her husband as he has in such relations with her. However, the law has not recognized her right to recover against one who has caused harm to such interests by conduct which is not intended to harm them." §695, Comment a. Preliminary drafts of the Restatement Second, for which Dean Prosser is the Reporter, have not yet reached this subject.

The prime argument for the *Hitaffer* result is equality between the sexes. Since the husband's cause of action for negligent invasion of consortium is generally recognized, it is said to fly in the face of the modern policy favoring the "emancipation" of married women to deny a corresponding action to the wife, whose "interest in the undisturbed relation with her consort is no less worthy of protection than that of her husband." Prosser, *supra*, at 704; see *Hitaffer* v. *Argonne Co.*, *supra*, 183 F. 2d at 819; cf. *Bennett* v. *Bennett*, 116 N. Y. 584, 590-91, 23 N. E. 17, 18-19 (1889). The wife's interest in the marital relation having long been accorded legal protection by claims for alienation of affections and similar torts, see *Bennett* v. *Bennett*, *supra*, it is argued that "relief is extended to the wife in [these] * * * cases for one basic reason, the interest of society in the protection of the family * * *. If this is the interest to be protected, * * * the law's protection should extend as well

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to the negligent as to the intentional injury." *Montgomery* v. *Stephan*, *supra* note 5, 101 N. W. 2d at 234; see *Lippman*, *supra*, 30 Colum. L. Rev. at 668. The "intentional" nature of such torts as alienation of affections is said not to afford a valid reason to "invoke the principle which gives a right of action for an act done malevolently when no right of action would exist if the act were done without malice," since in such torts "there is never that active malevolence toward the plaintiff which is made the gist of the right of action." Holbrook, *supra*, 22 Mich. L. Rev. at 8.[13] Finally,

[13] Indeed, it has been contended that the harm to the wife by negligently inflicted loss of consortium will often be greater than that done by an "intentional" invasion, since "desertion is usually, and adultery always, grounds for divorce, thus affording the injured spouse a chance to remarry, but physical disability of a spouse never leads to a legal opportunity to start anew and build a healthy family. Instead, in serious cases, the uninjured spouse is charged

it is urged that the harm done to the wife through serious injury to the husband is undeniably real, if only because "a sick, lame, nervous spouse is less desirable as a companion than a spouse in normal physical condition," Holbrook, *supra*, 22 Mich. L. Rev. at 8, but more especially when the injury permanently forecloses the wife's opportunity of having sexual relations and bearing children.

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Hence, it is said, the law should grant the wife such compensation as it can for the harm that she has suffered, and will continue to suffer, through the fault of the defendant.

The opposing arguments begin with the long history of common law authority against the wife's action, see *Deshotel* v. *Atchison, T. & S. F. Ry.*, *supra*, 328 P. 2d at 451,[14] but in no way stop there. It is contended that when

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with the lifelong duty of nursing an invalid, and frequently must forego the privilege of having legitimate children." Note, *supra*, 61 Colum. L. Rev. at 1354. On the other hand, Professor Jaffe argues, *supra*, 18 Law & Contemp. Prob. at 229: "But the law, of course, often distinguishes between willful and negligent interference as in the cases of emotional distress. An interest is protected only in so far as it serves a social purpose to protect it. When the act is willful the law may award damages for penal purposes. But more basically the law quite properly recognizes that a willful assault on the personality inflicts a far more serious blow. It is almost unthinkable that a court should reduce consortium to the bare element of the opportunity for sexual intercourse and pretend to see no basic difference of offense to the wife's interest between the incidental loss of that opportunity and the deliberate destruction of the whole marital relationship." Proponents of the wife's claim would, of course, deny that it relates solely "to the bare element of the opportunity for sexual intercourse . . . ."

[14] In *Best* v. *Samuel Fox & Co.*, *supra* [1952] A. C. at 730, Lord Goddard makes a point—also noted in Brett, *supra*, 29 Austral. L. J. at 395—which would render the absence of authority more significant than it has seemed to some courts and commentators. Proponents of the wife's action have sometimes sought to explain the lack of common law precedent as flowing from the wife's procedural inability, before passage of the Married Women's Acts, to bring any action without joining her husband as plaintiff; she had

the husband sues for his wife's injury, the real basis of his

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recovery is loss of her services, with the "sentimental" aspects of the recovery being in the nature of "parasitic" damages; since the wife in contrast has no right to her husband's services, but rather is entitled to his reciprocal obligation of support, and since she effectively recovers for this by sharing his own recovery for lost earnings due to his injury, the alleged "discrimination" between the spouses is said to be actually a rational distinction. See *Kronenbitter* v. *Washburn Wire Co.*, *supra*, 176 N. Y. S. 2d at 355; *Best*

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the right here contended for, it is said, but no remedy. *Hitaffer* v. *Argonne Co.*, *supra*, 183 F. 2d at 816. Lord Goddard concedes that the procedural bar might account for the absence of authority, prior to the Married Women's Acts, for a wife's action for alienation of affections or similar torts, since in such cases the husband "would hardly be willing to sue his own mistress." Brett, *supra*, 29 Austral. L. J. at 393, and if he did, would be profiting by his own wrong. See Prosser, *supra*, at 690-91; *Bennett* v. *Bennett*, *supra*, 116 N. Y. at 594, 23 N. E. at 20. But there is no reason to suppose that if the wife truly had a right to recover damages for loss of consortium resulting from physical injuries to her husband, the husband would have refused to lend his name to her action so as to provide her with a remedy, "especially as in the old law, the damages when recovered would belong to him." [1952] A. C. at 730. Compare Holbrook, *supra*, 22 Mich. L. Rev. at 2-4.

It thus seems likely that the absence of pre-1950 authority for the wife's recovery bespoke not merely a procedural but a substantive disability. Blackstone was apparently of this view: "notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded." 3 Blackstone, Commentaries *143. See also Brett, *supra*, 29 Austral. L. J. at 322. An American court which conceded that "the fundamental reason the wife could not recover at common law * * * was on account of *her inferior status*" has gone on to describe that concept as "totally repudiated" by modern legislation and to rely squarely on this policy reversal as a ground for recognizing the wife's action today. *Novak* v. *Kansas City Transit, Inc.*, *supra*, note 5, 365 S. W. 2d at 543, 547.

v. *Samuel Fox & Co.*, *supra*, [1952] A. C. at 735-36 (Lord Reid).[15] With loss of services eliminated, the wife's re-

[15] But see Brett, *supra*, 29 Austral. L. J. at 396: "[I]n the middle of the twentieth century, there is no principle which justifies giving the action to a husband and denying it to a wife. This can only be justified by an appeal to history. But history does not support the extension, approved by the House [of Lords in *Best* v. *Samuel Fox & Co.*, *supra*], of the enticement [or alienation of affections] action to the wife." Moreover, the historical assumption that loss of services constitutes the heart of the husband's recovery has been strongly attacked. See, *e.g.*, *Hitaffer* v. *Argonne Co.*, *supra*, 183 F. 2d at 813; *Dini* v. *Naiditch*, *supra*, 170 N. E. 2d at 891. Prosser states that "The loss of 'service' is an outworn fiction," at 704, and Harper & James that "the often hypothetical 'services' may [be] and frequently are the least valuable aspect of the incidents of the marital relation which presumably are as valuable to the wife as to the husband * * *" Vol. 1, at 643. It is further pointed out that damages may be awarded for alienation of affections without pleading or proving any loss of services, see *Bennett* v. *Bennett*, *supra*, 116 N. Y. at 587, 23 N. E. at 17. The "dismemberment" of the concept of consortium so as to give a predominant role to the element of services is also said to lack valid precedent. See Lippman, *supra*, 30 Colum. L. Rev. at 666-67. It does appear, as argued in Note, *supra*, 61 Colum. L. Rev. at 1243-44, that the earliest cases allowing recovery to the husband, although they often employed the master-servant analogy, were more concerned about the loss of society and comfort than the loss of services. See, *e.g.*, *Guy* v. *Lusy*, 2 Rolle 51, 81 Eng. Rep. 653 (K. B. 1618) ("mes cest action next founded pur aseun tort fait al feme, bes sur le prejudice que le baron ad sustaine, viz le perder del' company, & comfort que un feme port a sa baron * * *."); *Hyde* v. *Scyssor*, 3 Cro. 538, 79 Eng. Rep. 462 (K. B. 1619) ("but here the action is not brought for the battery of his wife, but for the loss and damage of the husband, for want of her company and aid * * * as where an action brought by the master for the battery of his servant * * *."); *Young* v. *Pridd*, 4 Cro. 89, 79 Eng. Rep. 679 (Ex. Ch. 1626) ("for

the loss which he had in wanting her company"). See Pound, *supra*, 14 Mich. L. Rev. at 188-89. Compare Brett, *supra*, 29 Austral. L. J. at 325-26, 328.

It is noteworthy, however, that a few American jurisdictions, while preserving the husband's right to recover for loss of his wife's services, have disallowed any recovery by him for the "sentimental" aspects of consortium. *West* v. *City of San Diego*, 54 Cal. 2d 469, 353 P. 2d 929 (1960); *Lockwood* v. *Wilson H. Lee Co.*, 144 Conn.

covery would involve only such elements as the diminution of the value of her husband's society and affection and the deprivation of sexual relations and the attendant loss of child-bearing opportunity—elements which, it is argued, are too personal, intangible, and conjectural to be measured in pecuniary terms by a jury. See *Deshotel* v. *Atchison, T. & S. F. Ry., supra*, 328 P. 2d at 451; Pound, *supra*, 14 Mich. L. Rev. at 194, 196. It is feared, moreover, that recognition of a cause of action on behalf of the wife would lead to a "double recovery." The husband in suing for his own injuries may recover not only for lost earnings (part of which recover presumably goes to support his wife) but also for the impairment of function evidence by his lost or diminished ability to engage in sexual intercourse, see Jaffe, *supra*, 18 Law & Contemp. Prob. at 229; cf. *Dagnello* v. *Long Island R. R.*, 289 F. 2d 797, 808 (2 Cir. 1961); *Helmstetler* v. *Duke Power Co.*, 224 N. C. 821, 824, 32 S. E. 2d 611, 613 (1945), and still further, probably, for the value of his wife's nursing services. See McCormick, Damages (1935), § 90. The fear is that in the wife's suit the jury will award duplicative damages to her for some of the same elements of injury. See Jaffe, *supra*, at 229; *Dini* v. *Naiditch*, *supra*, 170 N. E. 2d at 894-96 (Schaefer, C. J., dissenting). It is true that, as Chief Justice Schaefer apparently concedes, see *id.* at 895, this danger would be minimized where, as in the present case, the husband and wife have joined their

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claims so that these may be tried to a single jury. But once the wife's cause of action was recognized, the courts would have no power to require such a joinder—see 3 Moore;

153, 128 A. 2d 330 (1956) (only for expenditures required by wife's inability to perform services); *Martin* v. *United Elec. R. Co.*, 71 R. I. 137, 42 A. 2d 897 (1945); *Hawkins* v. *Front St. Cable Ry.*, 3 Wash. 592, 28 Pac. 1021 (1892).

Federal Practice (1948), at 1808, and 1 Harper & James, *supra*, at 640—and it is doubted that the trial court's instructions and its own power, combined with that of the appellate Court, *Dagnello* v. *Long Island R. R.*, *supra*, to review verdicts for excessiveness would suffice to remove the danger of double recovery. Other less persuasive arguments are that the harm to the wife through her husband's injury is too "indirect" to warrant recovery, since it was suffered without physical impact or apprehension thereof, *Best* v. *Samuel Fox & Co.*, *supra*, [1952] A. C. at 731 (Lord Goddard), and that allowing recovery by the wife would open the door to claims by children of the injured man and others whose "relational interests" were even more attenuated. *Neuberg* v. *Bobowicz*, *supra* note 9, 162 A. 2d at 666-67; *Best* v. *Samuel Fox & Co.*, *supra*, at 734 (Lord Morton of Henryton). Compare *Prosser*, *supra*, at 704.

Finally, in answer to the "equality" argument, it is argued that the husband's recovery for loss of consortium should itself be abrogated. That right is said to be "a fossil from an earlier era," Jaffe, *supra*, at 229—an anachronistic remnant of the wife's common law inability to sue and recover damages for her own injuries. *Best* v. *Samuel Fox & Co.*, *supra*, at 728, 733, 735 (Lords Porter, Goddard, and Morton of Henryton); *Neuberg* v. *Bobowicz*, *supra*, 162 A. 2d at 667. Adopting this view, some states, either by statute or decision, have eliminated the husband's action,[16] while others have restricted it to recovery for loss

of services.[17] Although several commentators approving

[16] Va. Code Ann. §55-36 (1950); Kan. Gen. Stat. Ann. §23-205 (1949), as construed in *Clark* v. *Southwestern Greyhound Lines*, 144 Kan. 344, 58 P. 2d 1128 (1936); *Rogers* v. *Boynton*, 315 Mass. 279, 52 N. E. 2d 376 (1943); *Helmstetler* v. *Duke Power Co.*, 224 N. C. 821, 824, 32 S. E. 2d 611, 613 (1945).

[17] See cases cited note 15 *supra*.

Hitaffer have indicated that producing "equality" between the sexes in this way would suit them just as well,[18] such a solution would be unacceptable to most adherents of that case.

(3) With the common law authorities so conflicting[19] and the opposing arguments so nearly in balance, we turn to an inquiry whether the historic common law position or the *Hitaffer* result comports better with other relevant elements of maritime law.

Defendant contends that the former answer can be rather quickly reached on the basis that the maritime law does not recognize even a husband's right to sue for loss of consortium, so that the "equality" argument is unavailable to the wife. In a District Court opinion in *Savage* v. *New York, N. & H. S. S. Co.*, adopted by this Court, 185 Fed. 778, 781 (1911), Judge Hough stated in dictum that "No instance of what is in substance an action per quod consortium amisit has been shown in admiralty." But in the following year in *New York & Long Branch Steamboat Co.* v. *Johnson*, *supra*, 195 Fed. 740 (3 Cir. 1912), a court created precisely such an "instance * * *" in ad-

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[18] 39 Mich. L. Rev. 820 (1941); 20 Fordham L. Rev. 342 (1951); 64 Harv. L. Rev. 672 (1951); 29 N. C. L. Rev. 178 (1951); 39 Cornell L. Q. 761 (1954). See also Brett, *supra*, 29 Austral. L. J. at 433.

[19] It was said, in 1916, that the civil law does not impose civil liability for negligent injury to the "sentimental" aspects of the marital relation, see Pound, *supra* note 11, 14 Mich. L. Rev. at 189—a point that would be of some importance in determining the content of maritime law. However, it appears doubtful that the statement correctly represents French law as that has recently evolved. See Marty et Reynaud, Droit Civil (1962), Nos. 382, 383, 384. The German Civil Code, Art. 845, recognizes a delictual liability for loss of services, but Art. 253 would seem literally to rule out a claim for the non-pecuniary elements of consortium; we have not investigated the texts or the authorities.

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miralty" by holding that a husband could sue "for the injury sustained by him through said injury to his wife" while a passenger on a steamship; the husband was awarded $1,147, of which $447 was for medical expenses and $700 "for the loss of the aid, comfort and society of his wife * * *" including therein probable future deprivation and expenses." (Record on Appeal, p. 237) The decision relied on two authorities, neither entirely relevant. One was the decision by Mr. Justice Story on circuit in *Plummer* v. *Webb*, *supra*, 19 Fed. Cas. 891, that a father, having a right to the services of his minor children, might sue in admiralty for damages from the tortious abduction of his son while on an ocean voyage. The other, even more dubious, was *The Sea Gull*, 21 Fed. Cas. 909 (No. 12,578) (C. C. Md. 1865), allowing a husband to recover for his wife's death—a situation in which damages have traditionally been limited to the "pecuniary" loss without the sentimental aspects of consortium, see *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 70-74 (1913), *Gerardo* v. *United States*, 101 F. Supp. 383, 385 (N. D. Cal. 1951), and a decision which was overruled by *The Harrisburg*, *supra*, 119 U. S. 199. On the other hand, the dismissal of a husband's action for both medical expenses and loss of society as the result of an alleged assault on his wife during a steamship voyage was affirmed, although without any explanation, in *Klein* v. *Munson S. S. Line*, 1934 A. M. C. 1310, 272 N. Y. Supp. 704, 242 App. Div. 179 (1st Dept 1934).[20] We have found no mari-

[20] The broad statement in 1 Benedict, Admiralty (6th ed. Knauth, 1940), at 366, that "When a personal injury to a wife is maritime by locality, her husband may recover his damages for loss of her services, loss of consortium, etc., in admiralty," thus rests solely on *N. Y. & Long Branch Steamboat Co.* v. *Johnson*, *supra*. *The Sea Gull*, *supra*, also cited, is inapposite, for reasons indicated in the text. Such cases as *Gustafson* v. *Swedish American Line*, 1940

time cases relating to claims by wives for loss of consortium other than the district court decisions denying such claims by wives of longshoremen which we cited at the outset, and certain decisions denying such claims by wives of seamen which we will discuss below. Our investigation of maritime law generally being thus inconclusive, we turn to the particular bases for recovery here asserted.

(4) We deal first with the claim based on negligence.

If Peter Igneri had been a seaman, it would be altogether clear that his spouse's claim based on negligent injury to him would fail. Prior to the Jones Act, this result would have been readily reached on the basis, severely criticized, see 1 Harper & James, *supra*, at 640, but nevertheless uniformly followed, that where the person directly injured has no claim, as the seaman did not, *The Osceola*, *supra*, 189 U. S. at 175, the spouse also has none. See *Savage* v. *New York, N. & H. S. S. Co.*, *supra*, 185 Fed. at 781; *Gustafson* v. *Swedish American Line*, 1940 A. M. C. 86 (N. Y. Sup. Ct. Kings County, 1940); *Smither & Co.* v. *Coles*, *supra*; 1 Harper & James, *supra*, at 640. When Congress, by the Jones Act, 46 U. S. C. §688, gave a seaman the right to recover for personal injury caused by the employer's negligence, it did not authorize recovery by the seaman's wife for loss of consortium. As to non-fatal injuries this is plain

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A. M. C. 86 (N. Y. Sup. Ct. Kings County, 1940), *La Frate* v. *Compagnie Generale Transatlantique*, 1952 A. M. C. 344 (S. D. N. Y. 1952), and *Born* v. *Norwegian America Line, Inc.*, 173 F. Supp. 33 (S. D. N. Y. 1959), cited in the 1962 pocket supplement to Benedict as authority for the proposition in question, similarly fail to support it. They do not hold that the husband can recover for loss of his wife's consortium or even for the services element thereof, but go off on the ground that any action brought by the husband on the basis of the wife's shipboard injury is subject to the same defenses, arising out of the contract of carriage, as her own action would be.

from the language of the statute, which authorizes only the seaman himself (not his wife) to "maintain an action for damages at law." *Westerberg* v. *Tide Water Associate Oil*

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Co., supra, 304 N. Y. 545; *Jordan* v. *States Marine Corp., supra*, 257 F. 2d at 233 (by concession). And it is established also that the damages recoverable by a seaman's widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium. *Tate* v. *C. G. Willis, Inc.*, 154 F. Supp. 402, 403 (E. D. Va. 1957); *Gerardo* v. *United States, supra*, 101 F. Supp. at 385, and authorities cited; see *Michigan Central R. R.* v. *Vreeland, supra*, 227 U. S. at 71.[21]

It is true that, as a longshoreman, Peter Igneri, unlike a seaman, had a right to recover for personal injury for negligence of the vessel, based on non-statutory maritime law. *Pope & Talbot, Inc.* v. *Hawn, supra*, 346 U. S. at 413, and cases cited in note 4 (1953). But that does not mean that in considering the novel question whether the spouse of a longshoreman should be allowed to recover for loss of consortium, we should ignore the maritime law denying any such right to the spouse of a seaman. The failure of the Jones Act to confer such a right on the spouse of a seaman cannot be dismissed as an inadvertence. The policy of the Federal Employers Liability Act, the regime which the Jones Act made applicable to seamen, was that the new remedy for the employee was to be exclusive and that claims of relatives recognized by state law were to be abrogated; the FELA had been thus authoritatively construed before

[21] Under the Death on the High Seas Act, 46 U. S. C. §761, a widow can recover damages only for the "pecuniary loss" sustained by the death, and not for the loss of her husband's society and companionship. *Middleton* v. *Luckenbach S. S. Co.*, 70 F. 2d 326, 330 (2 Cir. 1934); *First Nat'l Bank* v. *National Airlines, Inc.*, 171 F. Supp. 528, 537 (S. D. N. Y. 1958).

the Jones Act was passed. *New York Central & H. R. R. Co. v. Tonsellito*, 244 U. S. 360 (1917); see *Louisville & N. R. R. Co. v. Lunsford*, 216 Ga. 289, 116 S. E. 2d 232 (1960).

If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible

right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute denying such recovery to a seaman's wife. But, with neither of these conditions realized, our duty to avoid capricious differences in treatment between similarly situated persons forbids our fashioning a rule that would place the spouse of a harbor-worker in a different, and better, position than the spouse of a seaman. Perceiving the anomaly in the rule which forbade a seaman, but not a harbor-worker, to recover for negligence against the ship, Congress largely ended the discrimination against seamen by passing the Jones Act; we should not create a new anomaly by giving the harbor-worker's wife a claim denied to the seaman's. Here Congress has utilized its constitutional power "to alter, qualify, or supplement" the maritime law "as experience or changing conditions might require." *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 386 (1924). Its action in doing so "must not be read in a spirit of mutilating narrowness"; the courts must give "'hospitable scope' to Congressional purpose even when meticulous words are lacking." *United States v. Hutcheson*, 312 U. S. 219, 235 (1941). We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore.

(5) We come finally to the wife's claim based upon a warranty of seaworthiness. That doctrine, as stated in Mr. Justice Brown's much quoted second proposition in *The Osceola*, 189 U. S. 158, 175 (1903), is "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure

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to supply and keep in order the proper appliances appurtenant to the ship. Nothing was said as to the doctrine's going beyond the seaman so as to include his wife or children. Nor do we find any basis for such an extension in later Supreme Court decisions, of which *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), would be most helpful to the appellant. True, the opinion in that case declared "that contract alone is neither the sole source of the liability [for unseaworthiness] nor its ultimate boundary", and that the warranty of seaworthiness extended beyond seamen to others "who do the work of the ship without benefit of contract with the owner," 328 U. S. at 91. But the augmentation thus effected was still limited to persons doing the ship's work—the owner may not nullify his liability for unseaworthiness "by the device of having all who man the ship hired by others willing to furnish men for such service at sea or ashore", 328 U. S. at 91-92; the liability extends to cases "where the ship's work is done by others not in such an immediate relation of employment to the owner", 328 U. S. at 93, "to those who render [the ship's service] with his consent or by his arrangement," 328 U. S. at 95, to "men intermediately employed to do the work," 328 U. S. at 96. Nothing in this would suggest that the warranty of unseaworthiness extends to relatives of the maritime worker, of whose very existence the shipowner may be unaware.

We would not be understood as suggesting that the issue of extending the warranty of seaworthiness beyond marine workers was before the Supreme Court in these cases so that the Court's declarations that the warranty existed as to the workers would necessarily preclude its running to their spouses. The point is rather that when the Court has created "a species of liability without fault, analogous to other well known instances in our law," *Seas*

Shipping Co. v. Sieracki, supra, 328 U. S. at 94, it should not be lightly assumed that this strict liability runs to other persons not stated to be within its reach. When our law imposes strict liability, it often accompanies this with limitations, not existing in the case of liability based on fault, as to amount, as to persons benefited, or as to both. The considerations justifying absolute liability of shipowners for injury to the person or maritime workers do not necessarily prevail as to the interests of others in their relations with them—interests which, however real, rank lower in their claim for economic protection. Social policy may well require absolute liability for physical injury without imposing similar strict liability on actors and, indirectly, on the community, for damages less susceptible of monetary compensation. Recovery for personal injuries due to unseaworthiness was said by Judge Learned Hand to be "a kind of 'Workmen's Compensation Act'", *Grillea v. United States*, 232 F. 2d 919, 923 (2 Cir. 1956); workmen's compensation acts characteristically exclude suits by spouses or other relatives, see, *e.g.*, the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905; 2 Larson, Workmen's Compensation Law, § 66.20; *Smither & Co. v. Coles, supra*, overruling the *Hitaffer* case on this point, and cases cited at pp. 225-26, and *Thibodeaux v. J. Ray McDermott & Co.*, 276 F. 2d 42, 47 (5 Cir. 1960). As Professor Jaffe has noted, the elimination of fault as the basis of

liability deprives the damages award of any punitive or deterrent purpose, and requires consideration whether "the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function." 18 Law & Contemp. Prob. at 225. Appellant has cited no instance in which our law has allowed recovery for intangible injuries in the absence of

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fault; indeed, it has been rather slow to extend recovery for such injuries beyond intentional wrongs.[22]

Beyond all this our conclusion on the unseaworthiness claim is controlled by the negative result we have reached with respect to negligence. It would be anomalous in the last degree to hold that strict liability should have a broader reach than a related liability based upon fault. We can see no sensible basis for saying that although Congress ruled out a claim by the wife of a seaman against a palpably negligent shipowner, the wife of a longshoreman can recover against a shipowner who has been wholly without fault. Our conclusion, it should be emphasized, does not rest on the discrimination between the sexes criticized by *Hitaffer* and its supporters; we would reach the same result in the rare case of the husband of a seawoman as in the common ones of the wife of a seaman or of the stevedore doing seaman's work. We hold that the scheme of remedies, statutory and judicial, for injury to such maritime workers limits recovery to the person directly injured.

Affirmed.

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[22] Historically the husband's action for loss of consortium existed in the case of intentional or negligent acts by the defendant. Although the formulation in the Restatement of Torts, §693a, that the defendant is liable to the husband whenever its conduct is tortious toward the wife has a convenient symmetry, there seems to be almost no authority for—or against—the imposition of liability when the defendant has been without fault, and, as suggested in the text, this result is in no way inevitable as a matter of policy.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of September one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

PETER IGNERI and THERESA IGNERI,
Plaintiffs-Appellants,

v.

CIE. DE TRANSPORTS OCEANIQUES,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk